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19-P-528
19-P-800

Appeals Court

COMMONWEALTH vs. MIOSOTIS REYES
(and eleven companion cases¹).

Nos. 19-P-528 & 19-P-800.

Hampden. July 15, 2020. - November 17, 2020.

Present: Blake, Sacks, & Ditekoff, JJ.

Controlled Substances. Trafficking. Firearms. Grand Jury.
Constitutional Law, Grand jury, Indictment. Probable
Cause. Evidence, Grand jury proceedings, Indictment,
Firearm, Constructive possession, Exculpatory. Practice,
Criminal, Dismissal, Indictment, Grand jury proceedings.

Indictments found and returned in the Superior Court
Department on March 2, 2018.

Motions to dismiss were heard by Karen L. Goodwin, J.

Lee Baker, Assistant District Attorney, for the
Commonwealth.

Michelle A. Dame for Miosotis Reyes.
Robert F. Hennessy for Abner Alejandro.

¹ Five against Miosotis Reyes and six against Abner Alejandro.

DITKOFF, J. The Commonwealth appeals from an order dismissing indictments against the defendants, Miosotis Reyes and Abner Alejandro, for trafficking in thirty-six or more grams of heroin, G. L. c. 94C, § 32E (c) (2); trafficking in one hundred or more grams of cocaine, G. L. c. 94C, § 32E (b) (3); unlawful possession of a firearm, G. L. c. 269, § 10 (h) (1); unlawful possession of ammunition, G. L. c. 269, § 10 (h) (1);² possession of a firearm during the commission of a felony, G. L. c. 265, § 18B; and improper storage of a firearm near a minor, G. L. c. 140, § 131L (a) and (c).³ We conclude that evidence that the defendants were present in and stayed in the one-bedroom apartment in which contraband was found in plain view, in combination with the other evidence presented to the grand jury, was adequate to provide probable cause that they constructively possessed the drugs, firearm, and ammunition seized from the apartment. Further concluding that the grand jury were not impaired and that a single cache of ammunition may

² The grand jury returned two indictments on this charge against Alejandro, but the Commonwealth is appealing from the dismissal of only one of those counts.

³ The judge denied the defendants' motions to dismiss their respective indictments for unlawful possession of marijuana with the intent to distribute, G. L. c. 94C, § 32C (a). The Commonwealth is not appealing from the dismissal of the indictments against each defendant for receiving stolen property, G. L. c. 266, § 60, and reckless endangerment of a child, G. L. c. 265, § 13L.

be charged in a single count, we reverse so much of the order as dismissed the trafficking indictments and the indictments for unlawful possession of the firearm and ammunition. Concluding that the grand jury did not hear adequate evidence that the firearm was out of the defendants' control, we affirm the dismissal of the improper firearm storage indictments.

1. Background. Viewed in the light most favorable to the Commonwealth, the evidence presented to the grand jury was as follows. See Commonwealth v. Buono, 484 Mass. 351, 362 (2020). Members of the Holyoke police department were engaged in an investigation utilizing a confidential informant and focusing on a Hispanic male whose identity was not yet known to the police. As part of that investigation, the police obtained a warrant to search an apartment in Holyoke.

The warrant was executed on January 11, 2018, at approximately 3:45 P.M. Before entering the apartment, the police observed a man whom they believed to be a lookout in the alley leading to the side of the building. The police also observed a small security camera pointed at the back door of the apartment. Another security camera was later discovered in the bedroom window of the apartment.

The apartment itself was comprised of three rooms -- an open concept living area, which included kitchen and living spaces; a bedroom; and a bathroom. Upon entry, the police

located four adults and four children inside. The defendants, another man, and three children ranging in age from three to six years old were in the living area; the children were sitting on a couch in front of a television. Another adult man, who was later identified as the target of the police investigation, along with an infant asleep in a car seat carrier, were in the bedroom. Reyes is the mother of all four children, and the two youngest children share the same last name as Alejandro.

Reyes reported that the apartment was rented in her mother's name. In the bedroom, the police located "clothing . . . that appeared to belong to a younger female, matching the size of Ms. Reyes," "male clothing matching the size of Abner Alejandro," children's clothing in assorted sizes, and items for a baby, including diapers, formula, and toys. The police ultimately allowed Reyes to leave with the four children.

The search of the apartment and the three men present yielded an estimated forty-nine grams of heroin, 132 grams of cocaine, over eight ounces of marijuana, two firearms, twelve rounds of ammunition, and \$8,643 in United States currency.

The heroin and cocaine were recovered from the living area. The heroin was packaged in 1,963 bags, and was located in a shoebox under the television stand and in a bag on a coat rack. The cocaine was found in a tin on a shelf in the kitchen and in a backpack under the kitchen sink. Loose bags of heroin and

cocaine also were out on a shelf next to the refrigerator. Specifically, eight small baggies of cocaine were on the kitchen shelf, and thirteen baggies of heroin were next to the refrigerator.⁴ The marijuana was recovered from the bedroom, and was found in a crate and near the bed.

The police also recovered a loaded revolver wrapped in a T-shirt and also a sock containing three rounds of live ammunition from a wicker basket, three to four feet from where the children were sitting on the couch in the living area. A search of the man present in the living area with the defendants yielded a loaded nine millimeter handgun in his waistband.

Currency, totaling over \$7,000, was located in two shoeboxes under the television, and an additional \$708 was found by the police in the pocket of the target of the investigation. The remainder of the currency was found in various places in the living area and bedroom.

The police also seized an electronic money counter on the kitchen counter; packaging materials, a digital scale, and paperwork on a dresser in the bedroom; a "[b]low-out bag" near

⁴ We presume that these baggies of cocaine and heroin were the same ones referenced elsewhere in the testimony as loose bags of cocaine and heroin.

the bed;⁵ and an identification card issued by the Commonwealth of Puerto Rico in the bedroom.⁶

The grand jury returned eleven indictments against Reyes and twelve against Alejandro. After a hearing on their respective motions to dismiss,⁷ a judge concluded that inadequate evidence was presented to the grand jury to link the defendants to the living area of the apartment or to the illegal drugs, firearm, and ammunition found there. As a result, the judge dismissed all the indictments against the defendants except those for possession of marijuana with the intent to distribute.⁸

⁵ The term, "[b]low-out bag," was not defined for the grand jury.

⁶ As the judge noted and is mentioned infra, the Commonwealth obtained additional evidence through its investigation that was not introduced to the grand jury.

⁷ A transcript of the hearing on Alejandro's motion was not prepared. The Commonwealth has nonetheless met its burden of producing an adequate appellate record because we are able to resolve the issues raised on appeal based on our review of the grand jury evidence, the indictments, and the other documents provided. See Commonwealth v. Hill, 49 Mass. App. Ct. 58, 65 (2000).

⁸ The grand jury also returned indictments against the other two adults in the apartment. The judge dismissed all the indictments against the target of the investigation, and the Commonwealth did not appeal. With respect to the other adult found in the living area with the defendants, the judge dismissed the indictments charging him with trafficking in narcotics and relating to the firearm and ammunition discovered in the wicker basket. That person did not move to dismiss the indictments against him related to the firearm recovered from his own waistband, and the judge denied his motion to dismiss an indictment charging him with receipt of stolen property valued

2. Adequacy of the evidence supporting the indictments.

a. Standard of review. "Although, in general, a 'court will not inquire into the competency or sufficiency of the evidence before the grand jury,' . . . '[a]t the very least, the grand jury must hear enough evidence to establish the identity of the accused and to support a finding of probable cause to arrest the accused for the offense charged.'" Buono, 484 Mass. at 365, quoting Commonwealth v. Rex, 469 Mass. 36, 39-40 (2014).

"Probable cause is a 'considerably less exacting' standard than that required to support a conviction at trial." Commonwealth v. Stirlacci, 483 Mass. 775, 780 (2020), quoting Commonwealth v. O'Dell, 392 Mass. 445, 451 (1984). "It requires 'sufficient facts to warrant a person of reasonable caution in believing that an offense has been committed,' not proof beyond a reasonable doubt." Stirlacci, supra, quoting Commonwealth v. Levesque, 436 Mass. 443, 447 (2002). "As the issue of probable cause presents a question of law, we review the motion judge's determination de novo." Commonwealth v. Ilya I., 470 Mass. 625, 627 (2015).

b. Trafficking and possessory charges. The Commonwealth defends the indictments on the basis of constructive possession

at \$250 or more, which was related to the same firearm. The Commonwealth did not appeal, and that person ultimately pleaded guilty to carrying a firearm without a license. G. L. c. 269, § 10 (a).

rather than actual possession. Constructive possession requires "knowledge coupled with the ability and intention to exercise dominion and control." Commonwealth v. Tiscione, 482 Mass. 485, 494 (2019), quoting Commonwealth v. Dagraca-Teixeira, 471 Mass. 1002, 1004 (2015). "[M]ere presence in the area where contraband is found is insufficient to show 'the requisite knowledge, power, or intention to exercise control over the [contraband], but presence, supplemented by other incriminating evidence, will serve to tip the scale in favor of sufficiency.'" Commonwealth v. Woods, 94 Mass. App. Ct. 761, 765-766 (2019), quoting Commonwealth v. Schmieder, 58 Mass. App. Ct. 300, 303 (2003).

In the circumstances presented here, the evidence before the grand jury satisfied the "decidedly low standard" of probable cause to indict. Commonwealth v. Barbosa, 477 Mass. 658, 675 (2017), quoting Commonwealth v. Hanright, 466 Mass. 303, 311 (2013). The grand jury could have reasonably concluded that the defendants and Reyes's four children were a family that lived in the apartment at times, even absent affirmative evidence that it was their primary or sole residence. The defendants and the four children were present in the apartment, the apartment was rented to Reyes's mother (who was not present), and clothing in sizes consistent with that worn by the defendants, various children's clothing, and items for an infant

were in the bedroom. The grand jury could reasonably infer residence from this evidence. See Commonwealth v. Alves, 70 Mass. App. Ct. 908, 909 (2007) (clothing suitable for defendant found next to contraband supported probable cause).

The grand jury also heard evidence from which the grand jury could infer that the defendants were aware of the contraband inside the apartment and that they exercised dominion and control over it. The firearm, ammunition, and most of the heroin and cocaine were hidden in the living area of the apartment; however, a few bags of both drugs were out in plain view in the kitchen where the defendants were found by the police.⁹ See Commonwealth v. Brzezinski, 405 Mass. 401, 402-403 (1989) (police observed defendant and four other people around table "on which lay" cocaine). Cf. Commonwealth v. Ortega, 441 Mass. 170, 174-175 (2004) (contraband in plain view relevant to constructive possession analysis). The grand jury also heard evidence of other apparent signs that the small apartment was being used for drug distribution, including the presence of a lookout outside the apartment, the use of cameras to monitor the premises, the electronic money counter on the kitchen counter,

⁹ Although Alejandro argues that no evidence was presented that any of the heroin and cocaine was in plain view, the grand jury could have reasonably concluded that the loose bags of those drugs "out on a shelf next to the refrigerator" were in plain view.

and the packaging materials and digital scale in the bedroom where other items seemingly belonging to the defendants were also stored. Cf. Commonwealth v. Pratt, 407 Mass. 647, 652-653 (1990) (constructive possession supported by drugs and drug paraphernalia in plain view in small one-room cottage).

Contrast Commonwealth v. Boria, 440 Mass. 416, 420 n.5 (2003) (insufficient evidence to convict for drugs in common area where no evidence presented as to who leased apartment or paid bills, floor plan of apartment, or why other rooms, if they existed, were not searched).

We emphasize that the Commonwealth was required to present the grand jury only with the quantum of evidence adequate to support probable cause, and not the greater amount of evidence necessary to support a conviction.¹⁰ See, e.g., Commonwealth v. Fernandes, 483 Mass. 1, 7 (2019). Applying that standard and viewing the evidence in the light most favorable to the Commonwealth, probable cause existed for the grand jury to

¹⁰ For this reason, the cases primarily relied on by the parties in their briefs provide only minimal guidance. See Commonwealth v. Hamilton, 83 Mass. App. Ct. 406, 411-413 (2013) (sufficient evidence to convict for possession of cocaine with intent to distribute where defendant was primary occupant of small apartment, and cocaine was located on table in front of her); Commonwealth v. Brown, 34 Mass. App. Ct. 222, 225-227 (1993) (defendant entitled to required finding of not guilty on trafficking in cocaine charge where drugs were recovered from kitchen and one bedroom, but not bedroom with defendant's personal belongings).

believe that the defendants were not merely present in the apartment where drugs were being sold but also that they were active participants and exercised constructive possession of the illegal narcotics, the firearm, and the ammunition in the living area. See O'Dell, 392 Mass. at 451, quoting K.B. Smith, Criminal Practice and Procedure § 104 (1983) ("Probable cause does not require the same type of specific evidence of each element of the offense as would be needed to support a conviction"). Cf. Commonwealth v. Rakes, 478 Mass. 22, 29 (2017), quoting Commonwealth v. Truong Vo Tam, 49 Mass. App. Ct. 31, 37 (2000) (probable cause standard "has been employed primarily to strike down indictments in cases where a grand jury has heard . . . no evidence whatever that would support an inference of the defendant's guilt"). The defendants' arguments may prove persuasive at trial (if the Commonwealth fails to present additional evidence), but they do not defeat probable cause as to these charges.¹¹ See Alves, 70 Mass. App. Ct. at 908 (evidence adequate to indict even where "perhaps insufficient to support a conviction").

c. Firearm storage charges. The indictments for improper storage of a firearm near a minor stand on different footing.¹²

¹¹ We express no view whether the evidence presented to the grand jury would provide sufficient evidence at trial to support convictions.

"The firearm storage statute[, G. L. c. 140, § 131L,] applies to weapons when they are neither carried nor under the control of their owner or other authorized user." Commonwealth v. Patterson, 79 Mass. App. Ct. 316, 318 (2011). Accord Commonwealth v. Runyan, 456 Mass. 230, 236 (2010) ("The gun owner's obligation to secure the firearm in accordance with the statute arises only when the firearm is stored or otherwise outside the owner's immediate control"). "'[C]ontrol' for purposes of this statute is distinguishable from the element of possession (and particularly constructive possession) in other criminal statutes." Commonwealth v. Cantelli, 83 Mass. App. Ct. 156, 171-172 (2013). Rather, a firearm is under its owner's control and, therefore, not stored in violation of the statute, "when that person has [the firearm] sufficiently nearby to prevent immediately its unauthorized use." Id. at 171, quoting Patterson, supra at 319. Whether a firearm is under a defendant's control requires a fact-specific inquiry that includes consideration of the respective locations of the

¹² We treat Alejandro as properly adopting Reyes's argument concerning the firearm storage indictment, even though he did not make the request until oral argument. See Mass. R. A. P. 16 (j) (2), as appearing in 481 Mass. 1628 (2019) (appellee may adopt by reference any part of brief of another appellee). To foreclose Alejandro from doing so would merely invite further litigation through the filing of a new motion pursuant to Commonwealth v. McCarthy, 385 Mass. 160, 162-164 (1982), and, relatedly, further delay.

firearm and its owner as well as that person's ability to immediately reach the gun. See Cantelli, supra at 172.

Here, the grand jury were not provided with any evidence demonstrating that the firearm was out of the defendants' control in this sense. See Commonwealth v. Reyes, 464 Mass. 245, 258 (2013) (firearm storage statute applies once defendant stores or keeps firearm not on person, or under his or her control); Instruction 7.630 of the Criminal Model Jury Instructions for Use in the District Court (2014) (second element of improper storage of firearm jury instruction requires proof that "the defendant was not carrying the [firearm] . . . or did not have the [firearm] . . . under [his] . . . immediate control"). The grand jury heard that the firearm was in a wicker basket in the kitchen portion of the living area.¹³ The defendants also were in the kitchen, and the children were on the couch within three to four feet of the firearm. No further evidence was presented as to the defendants' proximity to the firearm, but other evidence demonstrates that the kitchen was relatively small.¹⁴ Viewing the evidence in the light most

¹³ In one instance, the wicker basket was described as located "next to" the television in the living area, and, in another instance, under the television stand in the kitchen portion of the living area.

¹⁴ The grand jury heard that the entire living area was approximately twenty feet by twelve feet and received a diagram

favorable to the Commonwealth, no reasonable inference could be drawn that the firearm was out of the defendants' immediate reach because of the absence of any evidence regarding whether the defendants were in the living area. Similarly, because no evidence was presented to suggest whether the firearm was "stored" in the basket for an appreciable period of time, rather than simply wrapped in a T-shirt and thrown in the basket as the police approached, the grand jury could not infer that the firearm was likely outside the defendants' immediate control at some earlier point. Accordingly, we conclude that the firearm storage charges were properly dismissed.

3. Integrity of grand jury proceedings. "It is well settled that '[p]rosecutors are not required in every instance to reveal all exculpatory evidence to a grand jury.'" Commonwealth v. Hernandez, 481 Mass. 189, 191, cert. denied, 140 S. Ct. 168 (2019), quoting Commonwealth v. McGahee, 393 Mass. 743, 746 (1985). "Rather, the integrity of the grand jury proceedings has been impaired and dismissal is warranted where the omitted exculpatory evidence 'would likely have affected the grand jury's decision to indict.'" Fernandes, 483 Mass. at 7, quoting Commonwealth v. Clemmey, 447 Mass. 121, 130 (2006). "Similarly, the presentation of false or misleading evidence

of the apartment that depicted the location of the couch next to the kitchen area.

only requires the dismissal of an indictment where the evidence was presented with the knowledge that it was false, with the express purpose of obtaining an indictment, and 'probably influenced the grand jury's determination to hand up an indictment.'" Fernandes, supra at 8, quoting Commonwealth v. Mayfield, 398 Mass. 615, 621 (1986). "[T]he defendant bears a heavy burden to show impairment of the grand jury proceeding." Commonwealth v. LaVelle, 414 Mass. 146, 150 (1993).

Reyes argues that, even if the grand jury heard adequate evidence to support the indictments, the indictments were properly dismissed because the Commonwealth failed to provide the grand jury with three key pieces of information that would have undercut the inference that the defendants lived or stayed at the apartment. For the reasons that follow, we are confident that the absent evidence would not have changed the grand jury's decision to indict.

First, the Commonwealth did not disclose that the police used a confidential informant to make controlled buys of heroin at the apartment on three occasions prior to obtaining the search warrant. Reyes points out that the confidential informant did not report seeing her during those controlled buys. That Reyes was not previously observed during these limited opportunities to view the occupants of the apartment was unlikely to influence the grand jury's determination where Reyes

was present when the police searched the apartment and had a substantial connection to the apartment through her mother and the clothing in the apartment. Cf. Commonwealth v. Fennell, 13 Mass. App. Ct. 910, 910-911 (1982) ("Although the defendant was not observed during the period the apartment was under surveillance, he did arrive while the search was in progress").

Second, Reyes contends that the grand jury heard definitive testimony that the defendants "live or stay on a regular basis in the apartment," but that the police report demonstrates that this was merely a belief on the part of the police. In fact, the police officer explained to the grand jury that the apartment was in Reyes's mother's name, and that it contained clothing matching Reyes's size, children's clothing, and items for a baby. Any ambiguity in the source of the belief did not likely influence the grand jury's decision.

Finally, Reyes asserts that the grand jury should have heard that neither the paperwork nor the identification card seized from the bedroom bore the name of either defendant (or any of the other persons found in the apartment). The paperwork was a utility bill for the apartment addressed to an individual sharing the last name of Reyes. This evidence was inculpatory as it lends further support to the conclusion that the apartment was rented by defendant Reyes's family. Although the identification card was not issued to any of the persons in the

apartment, its presence in the bedroom was unlikely to influence the grand jury's decision given the other items discussed above that more strongly linked the defendants to the apartment. Considering all the undisclosed evidence together, Reyes has not shown that the integrity of the grand jury proceedings were impaired.

4. Ambiguity as to the ammunition indictment. Relying on Commonwealth v. Barbosa, 421 Mass. 547 (1995), Reyes argues that the single indictment for unlawful possession of ammunition against her must be dismissed because it cannot be determined whether she was indicted based on the ammunition found inside the revolver or that hidden in the sock. We disagree.

In Barbosa, 421 Mass. at 548, 550, the grand jury heard evidence that the defendant was involved in two separate drug transactions, with two different individuals, on the same day, but returned an indictment for only one count of distribution of cocaine. The defendant was convicted on that count after the Commonwealth again presented evidence of both transactions at trial. See id. at 549. The Supreme Judicial Court concluded that the conviction violated art. 12 of the Massachusetts Declaration of Rights because the defendant "may have been 'held to answer' for a crime not set forth in the indictment." Id. at 552, quoting Commonwealth v. Dean, 109 Mass. 349, 352 (1872).

This case is unlike Barbosa. Rather than hear that Reyes committed the same crime on two distinct occasions, the grand jury here heard evidence that Reyes constructively possessed ammunition, which was recovered from the wicker basket. That some of the ammunition was inside the revolver and some was inside a sock does not put this case within the confines of Barbosa.¹⁵ Rather, the Commonwealth is not precluded from charging possession of a single cache of ammunition in one indictment. See Commonwealth v. Smiley, 431 Mass. 477, 479-480 (2000) (Commonwealth could, but not required to, seek separate indictments where defendant assaulted two occupants of same dwelling). Cf. Commonwealth v. Mazzantini, 74 Mass. App. Ct. 915, 916 (2009), abrogated on other grounds by Commonwealth v. Negron, 462 Mass. 102 (2012) (no error where Commonwealth introduced three ammunition clips without specifying which one supported single count of unlawful possession of large capacity feeding device); Commonwealth v. Berry, 63 Mass. App. Ct. 910, 911 (2005) (no danger defendant was convicted of acts different from those indicted where there was one seizure of cocaine from three locations in bedroom). Contrast Commonwealth v. Muniz, 456 Mass. 166, 174 (2010) (conviction on single indictment for

¹⁵ There was no suggestion in the evidence before the grand jury that Reyes's possession of the ammunition in the revolver and her possession of the ammunition in the sock resulted from two separate acts by her.

possession of marijuana reversed where marijuana was first seized after defendant dropped it while standing outside and then different marijuana was seized in subsequent search of defendant's apartment).

5. Conclusion. We reverse so much of the judge's order as dismissed the indictments against each defendant for trafficking in cocaine and heroin, and possession of a firearm and ammunition. We affirm so much of the order as dismissed the indictments for improper storage of a firearm near a minor.

So ordered.